IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUIT NO. 616 OF 1985.

Savita Chemicals Pvt.Ltd.,
a private company limited
by shares incorporated under
the Companies Act, 1956
having its registered office
at Narinan Bhavan, Nariman
Point, Bombay 400 021. ... Plaintiffs.

Versus.

1. Haryana State Electricity Board,
   a Corporation constituted under
   the Electricity (Supply) Act,
   1948, having its office at
   S.C.O.No. 50-51, Sector 17-A,
   Chandigarh.

2. State Bank of India,
   a Banking Company constituted
   under the State Bank of india
   Act, 1955 having its Main
   Branch at Bombay Samachar
   Marg, Bombay 400 001. ... Defendants.

Shri J.K.Hegde for the Plaintiffs.

None for the Defendants.

CORAM : ABHAY S.OKA, J.

DATED : 18th October, 2007.

ORAL JUDGMENT.:

1. The Plaintiffs have instituted this suit for an injunction against the Defendants from in any manner enforcing the Bank Guarantee dated 27th June 1980 issued by the 2nd Defendant. A prayer for injunction has also been made against the 2nd Defendant from in any manner effecting payment of any sum to Defendant No.1 under the

said guarantee. Another prayer is for a decree in the sum of Rs.30,000/- against the 1st Defendant together with interest at the rate of 18% per annum.

2. The Plaintiff-company is carrying on business as manufacturers of Transformer oil and petroleum specialities. The 1st Defendant is a body corporate incorporated under section 5 of the Electricity (Supply) Act, 1948. The 2nd Defendant is a Bank.

3. In February 1998 the 1st Defendant floated a tender initially for supply of transformer oil. On 18th February 1980 the Plaintiffs made an offer for supply of 1100 kilo litres of transformer oil carrying ISI mark and conforming to particular specifications at the rate of Rs.7020/- per kilo litre f.o.r destination by rail/road inclusive of transit insurance but exclusive of central sales tax and excise duty as well as octroi. The price was subject to increase as stated in the offer. The Plaintiffs offered to supply entire quantity of oil within the period of three months from the date of receipt of clear order.

4. According to the Plaintiffs by a telegram dated 22nd May 1980 the 1st Defendant accepted the Plaintiffs' offer and on 29th May 1980 the 1st Defendant forwarded a letter of acceptance of the tender which provided for

details of the quantity to be dispatched at various destinations. The Railway receipts or duly receipted challans were to be sent either to State Bank of Patiala or to the United Bank of India, Chandigarh and the bill of cost in triplicate to the Chief Accounts Officer of the 1st Defendant for payment.

5. According to the offer the Plaintiffs, they procured from the 2nd Defendant a bank guarantee dated 27th June 1980 for the sum of Rs.7,56,756/- representing 10% of the value of the offer. It is stated that the guarantee was valid upto 26th June 1985.

6. According to the case of the Plaintiffs, in the beginning of June 1980 the Government of India announced increase in the price of transformer oil by Rs.1133/-. On the basis of the said increase, the Plaintiffs by their letter dated 10th June 1980 addressed to the Chief Engineer of the 1st Defendant claimed enhancement in the price. It is stated that inspite of repeated requests the 1st Defendant did not issue an amendment to the acceptance of tender in regard to the revision of the price of the transformer oil. According to the case of the Plaintiffs in the second week of July 1980, its representative met the Chief Engineer of the 1st Defendant. The Chief Engineer informed the said representative that in the accepted offer there was a

price escalation clause and therefore, it was not necessary to amend the acceptance of tender.

7. It is alleged in the plaint that though stock of oil was kept ready by the Plaintiffs, the delivery was delayed as the 1st Defendant delayed inspection and testing of the material. It is the case of the Plaintiffs that on various dates mentioned in paragraph 8 of the plaint certain quantity of the oil was offered for inspection. It is stated that the inspection and testing of the quantity of 400 kilo litres of oil was carried out by the 1st Defendant on 31st July 1980. It is stated that the material was dispatched by goods train. It is stated that the oil was packed in new drums and was consigned at the risk of Railways. It is stated that the material was covered by the policy of insurance of the National Insurance Co.Ltd.

8. According to the case of the Plaintiffs, there were delays at different destinations in receiving the railway receipts from the State Bank of Patiala by Union Bank of India to whom the railway receipts were sent by the Plaintiffs. It is stated that the material reached the destination before different consignees received the railway receipts and therefore, the consignments remained uncleared by different consignees at different destinations and incurred demurrage and/or wharfage. It

is the case set out in the plaint that the Plaintiffs are not liable to pay the said amount. It is stated that in all probability the drums containing the material awaiting clearance were not stored indoors. It is stated that though a case was made out by the 1st Defendant regarding loss or damages to the goods, no claim was lodged by the 1st Defendant with the insurance company.

9. According to the case of the Plaintiffs, the 1st Defendant failed and neglected to refund the security deposit in the sum of Rs.30,000/- and in fact in addition to the said fixed deposit the 1st Defendant deducted a sum of Rs.30,000/- from the Plaintiffs' bill dated 30th November 1980. According to the case of the Plaintiffs, the 1st Defendant by letter dated 6th February 1981 made a claim of Rs.32,722.01 on account of alleged demurrage/wharfage and shortages. The total claim made by the said letter was Rs.62,722.01 and after deducting a sum of Rs.30,000/- it was reduced to Rs.32,722.01. By further letter dated 27th November 1981 the Accounts Officer of the 1st Defendant called upon the Plaintiffs to make the payment on the following counts:

1. Shortages. ... Rs. 61,934.77
2. Damages for delay. ... Rs.2,18,378.91

3. Wharfage/under charge.	...	Rs. 44,142.30
4. Misc.Recoveries.	...	Rs. 32,722.01

Total	...	Rs.3,57,177.99

It is stated that the 1st Defendant made a claim upon the 2nd Defendant in the sum of Rs.7,56,756/- which represented the full value of the bank guarantee. By another letter dated 30th July 1982, the 1st Defendant made a claim in the sum of Rs.4,00,433.23 upon the Plaintiffs, the bifurcation of which is as under:

1. Cost of oil received short	..	Rs.1,53,307.92
2. Wharfage charges.	..	Rs.2,14,403.30
3. Miscellaneous recoveries.	..	Rs. 32,722.01

Total.	..	Rs.4,00,433.23
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10. By Advocate’s letter dated 11th October 1982 addressed to the Chief Engineer of the 1st Defendant, the Plaintiffs asserted that there was no liability for any loss or damage on account of alleged shortage and/or alleged wharfage/demurrage charges. The Plaintiffs stated that there was no delay on their part. Various particulars were sought by the Advocate for the Plaintiffs from the 1st Defendant by the said letter.

11. The Accounts Officer of the 1st Defendant by letter dated 3rd January 1983 addressed to the 2nd Defendant withdrew the claim of Rs.7,56,756/-. Thereafter, the Plaintiffs got the validity of the bank guarantee extended upto 26th December 1984. By letter dated 20th July 1984 the Accounts Officer of the 1st Defendant called upon Plaintiffs to pay the sum of Rs.3,76,542.69 ps. Thereafter there was further correspondence between the parties. The stand taken by the Plaintiffs was that no particulars as demanded by the Plaintiffs' Advocate's letter dated 11th October 1982 were furnished by the 1st Defendant. It was pointed out that in fact there was no reply to the said letter of the Advocate for the Plaintiffs. Reliance has been placed on correspondence made between the Plaintiffs and the 1st Defendant. The case of the Plaintiffs is that the 1st Defendant has no monetary claim against the Plaintiffs and therefore, the 1st Defendant is not entitled to enforce the bank guarantee. Therefore, prayer for perpetual injunction has been made. The Plaintiffs have also prayed for refund of Rs.30,000/- with interest being the security deposit with the 1st Defendant. The Plaintiffs have also claimed refund of Rs.30,000/- being the amount deducted by the 1st Defendant from the bill of the Plaintiffs on 13th November 1980.

12. The 1st Defendant filed its written statement reiterating the claim of the 1st Defendant for the sum of Rs.3,76,542.69 ps. against the Plaintiffs comprising of cost of short supply of material, damages for delay in execution of the purchase order, wharfage/demurrage charges and miscellaneous charges. It was contended that the 1st Defendant was entitled to invoke the bank guarantee on account of the defaults committed by the Plaintiffs. The 1st Defendant reiterated that there was shortage in supply. It is contended that the 1st Defendant is not liable to refund a sum of Rs.30,000/- paid by the Plaintiffs by way of deposit. However, the 1st Defendant has admitted the claim of the Plaintiffs to the extent of Rs.30,000/- being an amount deducted by the 1st Defendant from bill dated 13th November 1980. The 1st Defendant prayed for dismissal of the suit.

13. Issues were settled on 3rd August 2007. The said issues read thus:

i) Whether the Defendant No.1 proves that this Court has no territorial jurisdiction to try or entertain the suit?

ii) Whether the Plaintiffs prove that they are entitled to an order and injunction from this Court restraining Defendant No.1, its officers, servants and agents from enforcing the bank guarantee bearing No.B/80/630 dated 27th June 1980 issued by Defendant No.2 and/or from making any claim there under upon Defendant No.2 and/or from recovering or realizing any sum there under

from Defendant No.2?

iii) Whether the Defendant No.1 prove that they are entitled to forfeit the security deposit amount of Rs.30,000/- of the Plaintiffs?

iv) Whether the Plaintiffs are entitled for a decree on admission against the Defendant No.1 in the sum of Rs.30,000/- being the amount deducted by the Defendant No.1 from Plaintiffs' bill, as admitted by the Defendant No.1 in para 28 of their written statement?

v) Whether the Plaintiffs prove that the Defendant No.1 is liable to pay interest at 18% per annum upon Rs.30,000/- being the amount deducted by the Defendant No.1 from Plaintiffs' bill, till full and final realisation?

vi) Whether the Plaintiffs prove that Defendant No.1 is liable to pay a sum of Rs.30,000/- being the security deposit with interest at 18% per annum to the Plaintiffs?

vii) What relief?

viii)What order and decree?

By order dated 3rd August 2007 the suit was adjourned for recording of evidence to 3rd September 2007. When the issues were settled none appeared for the Defendants.

14. The Plaintiffs have filed affidavit in lieu of examination-in-chief of Mr.Uday Chandrakant Rege, Constituted Attorney of the Plaintiffs. The examination-in-chief of the said witness was recorded on 8th October 2007. As none appeared for the Defendants on that day, cross-examination of the witness was treated as closed and the suit was set down for

recording evidence of the Defendants and/or for argument. Today when the suit is called out none appeared for the Defendants. Therefore, I have proceeded to hear the argument of the learned Counsel for the Plaintiffs.

15. The learned Counsel appearing for the Plaintiffs has taken me through the averments made in the pleadings as well as the affidavit in lieu of evidence. He pointed out that in view of what is stated in the affidavit, the Plaintiffs have made out a case for leading secondary evidence of the documents the originals of which are misplaced. He pointed out that the 1st Defendant has admitted the claim of the Plaintiffs to the extent of Rs.30,000/-. He submitted that as the Defendants have led no evidence, the case made out by the Plaintiffs will have to be accepted and decree will have to be passed.

16. I have carefully considered the submissions of the learned Counsel for the Plaintiffs and also perused the plaint, written statement and affidavit in lieu of evidence. The affidavit in lieu of evidence has been filed by the Plaintiff. The averments made in the plaint have been duly proved by the said affidavit. The Plaintiffs have filed true copies of the original documents on which they are relying upon. The witness

has stated in the affidavit that the original documents were lost while office of the earlier Solicitors and Advocates of the Plaintiffs was shifted. The witness has deposed regarding proof of the said documents. In view of the statements made on oath in the affidavit that the original documents have been lost/misplaced while office of the Solicitors was being shifted, a permission will have to be granted to the Plaintiff to lead secondary evidence of the said documents in the form of copies of the documents which are produced along with the list of documents.

17. Prayer (d) of the plaint is for a decree in the sum of Rs.30,000/- deducted by the 1st Defendant out of the Plaintiffs' bill No.0591 dated 13th November 1980 and interest thereon at the rate of 18% per annum. Paragraph 28 of the written statement of the 1st Defendant reads thus:

> "28. With reference to para 18, this Defendant states that the Plaintiffs are entitled to an order and decree against this Defendant for payment of Rs.30,000/- being the amount deducted by this Defendant from Plaintiffs' bill No.0591 dated 13th November 1980. This Defendant further denies that the Plaintiffs are entitled to the interest at 18%

p.a. thereon or at any rate."

Therefore, there is an admission in so far as payment of the sum of Rs.30,000/- is concerned and to that extent issue No.4 will have to be answered in the affirmative. In prayer (d) further interest at the rate of 18% per annum has been claimed by the Plaintiffs. Considering the nature of the transaction further interest will have to be awarded at the rate of 6% per annum.

18. About the terms and conditions of the purchase order, there is no dispute between the parties. The purchase order dated 29th May 1980 is for quantity of 1100 kilo litres. There is a letter dated 25th August 1980 sent by the Executive Engineer of the 1st Defendant to the Plaintiff stating that out of the agreed quantity, 700 kilo litres of the oil is to be supplied as per the said schedule and balance 400 kilo litres is to be supplied during January and February 1981.

19. The first claim made by the 1st Defendant against the Plaintiff was on 6th February 1981 . The said claim as evidenced by the document dated 6th February 1981 reads thus:

i) Demurrage/wharfage so far intimated by the consingees. ... Rs. 13,503.80

ii) Total amount due on account

	of material found short on physical verification at Dhulkote 200.222 ltr.	...	Rs. 1,801.40
iii)	Shortage reported by Ken. Ballabgarh in SNB page 2.299 KL..		Rs. 20,685.26
iv)	Shortage in 3 No.drums in leaking condition in Dhulkote Store 479 ltr.	...	Rs. 4,309.80
v)	Average shortage on 3100 drums 2.492 K.L.	...	Rs. 22,421.75
	Total.	...	Rs. 62,722.01
	Less amount deducted from bill No.0591 dt.30.11.1980	...	Rs. 30,000.00
	Balance due	...	Rs.32,722.01

The memo dated 22nd November 1981 issued by the Accounts Officer of the 1st Defendant records an additional claim of Rs.61,934.77 ps. on account of shortages, a sum of Rs.2,80,378.91 on account of damages due to delay in delivery and a sum of Rs.44,142.30 being wharfage/under charge and a sum of Rs.32,722.01 has been added making a total claim of Rs.3,57,177.99 ps. In letter dated 30th July 1982 the 1st Defendant has made the same claim in respect of wharfage charges and miscellaneous recoveries. However, the 1st Defendant came out with a claim of Rs.1,53,307.92 ps. on account of shortage. Thereafter there is a communication dated 11th October 1982 issued by the Advocate for the Plaintiffs to the 1st Defendant calling upon the 1st Defendant to disclose several particulars of the claims made. In the

meanwhile, the bank guarantee was extended by the Plaintiffs from time to time. On 20th July 1984, the 1st Defendant made a claim of Rs.3,76,542.69 ps. on the same count, viz. shortage, damages for delay, wharfage/demmurrage charges and miscellaneous recoveries. By a further communication dated 6th December 1984, the 1st Defendant brought down the claim to the sum of Rs.2,60,412.53 ps. being the wharfage and damages for delay and a sum of Rs.1,16,130.16 on account of cost of short supply. There is another letter dated 2nd February 1985 sent by the Advocate for the Plaintiff to the 1st Defendant calling upon the 1st Defendant to give particulars of various claims raised by the 1st Defendants. The witness examined by the Plaintiff has stated that there was no response from the 1st Defendant to the Plaintiffs' Advocates' letters dated 11th October 1982 and 2nd December 1985.

20. Thus the correspondence produced by the Plaintiffs clearly shows that the basic claim of the 1st Defendant is on account of the shortage of supply of oil and delay in delivery of the oil. It is not the case of the 1st Defendant that the transformer oil was not supplied by the Plaintiffs. Thus the burden to prove short delivery or delay in delivery of the oil was on the 1st Defendant. The burden was on the 1t Defendant to prove that a loss was caused to the 1st Defendant due

to delay. The Claim for wharfage/demurrage charges is again related to delay. The case made out by the witness of the Plaintiffs about compliance with the terms and conditions of the purchase order by the Plaintiffs has gone unchallenged and on the other hand there is no evidence led by the 1st Defendant to prove their claim.

21. Thus the 1st Defendant has failed to prove the allegations of breaches committed by the Plaintiffs. On the other hand, as stated earlier, there does not appear to be any dispute regarding delivery of transformer oil by the Plaintiffs. The 1st Defendant tried to invoke the bank guarantee on account of the aforesaid breaches and on the basis of the claim made by the 1st Defendant. The 1st Defendant has failed to substantiate its case. Therefore, it is obvious that the 1st Defendant was not entitled to invoke the bank guarantee. Moreover the 1st Defendant was not entitled to retain the security amount of Rs.30,000/-.

22. In view of the aforesaid factual position, a case is made out for passing a decree in terms of prayer clauses (a) to (c). However, in so far as the prayer (c) is concerned, the interest will have to be awarded at the rate of 6% per annum.

23. The first Defendant has raised an issue of territorial jurisdiction of this Court. However, I find that on 26th February 1985 this Court has granted leave under clause 12 of the Letters Patent to institute the suit. There is neither any prayer made nor a case made out by the 1st Defendant for revocation of the leave. Therefore, the 1st issue will have to be answered in favour of the Plaintiffs. The third issue will also have to be answered in favour of the Plaintiffs. The other issues will have to be answered partly in favour of the Plaintiffs.

24. Hence the following order is passed:

i) There will be a decree in terms of prayer clauses (a) and (b). There will be a decree in terms of prayer clauses (c) and (d) with modification that the further interest payable on the amounts mentioned therein will be at the rate of 6% per annum from the date of institution of the suit till realisation or payment.

ii) There will be no order as to costs as against the 2nd Defendant. However, the 1st Defendant is directed to pay costs of the suit to the Plaintiffs.

iii) Certified copy is expedited.

Judge.